

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TIMOTHY NISHIMURA,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

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Case No. DISM-00-0074

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Personnel Appeals Board hearing room in Olympia, Washington, on January 22, 2002.

1.2 Appearances. Appellant Timothy Nishimura was present and was represented by Joseph Brillante, Attorney at Law. Elizabeth Delay Brown, Assistant Attorney General, represented Respondent Washington State Patrol.

1.3 Nature of Appeal. This is an appeal from the dismissal of a Washington Management Service employee for violation of agency regulations. Respondent alleged that Appellant engaged in misconduct for a period of nine years that included sexually harassing female coworkers, creating a hostile work environment, interfering in subordinates' personal lives, excessive generosity, using state-owned equipment and time for personal gain, and using inappropriate training tools to train subordinates.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Timothy Nishimura was a Crime Laboratory Manager and permanent employee of Respondent Washington State Patrol (WSP) in the Marysville Crime Laboratory. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on October 12, 2000.

2.2 Appellant began employment in the Seattle Crime Laboratory in July 1975. In April 1976, he accepted a position with the Federal Bureau of Investigation for three years. Appellant returned to WSP in the Seattle Crime Laboratory in October 1979. Appellant was promoted to supervisor in 1989. In October 1997, Appellant was promoted to manager of the Marysville Crime Laboratory.

2.3 Appellant received good or above average performance evaluations. He had no history of formal disciplinary action. However, he was counseled in writing twice for issuing memorandums containing language ridiculing the agency. In addition, he was verbally counseled on several occasions regarding his management and supervisory skills and the need to treat all employees with dignity and respect.

2.4 By letter dated September 6, 2000, Appellant was dismissed from his position for violating the WSP regulations addressing appropriate work place behavior and activities. Appellant was aware of the regulations and his duty to comply with the provisions therein. Appellant had received training in sexual harassment and harassment awareness and had attended management training.

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1 *Relevant WSP Regulations*

2 2.5 WSP Regulation 8.00.030 Unbecoming Conduct states, in relevant part:

3 Employees shall not engage in conduct which:

- 4 • Impedes the ability of the department or effectively fulfill its responsibilities.
5 • Causes an adverse effect on the discipline or efficiency of the department.
6 • Impairs their ability to perform their job.

7 2.6 WSP Regulation 8.00.180 Neglect of Duty states, in relevant part: "[n]eglect of duty is
8 established when it is shown that an employee has a duty to his/her employer and that he/she failed
9 to act in a manner consistent with that duty."
10

11 2.7 WSP Regulation 8.00.190 Conducting Private Business While on Duty states, in relevant
12 part: "[i]t is the obligation of employees to devote their on-duty time to official matters only."
13

14 2.8 WSP Regulation 8.00.385 Discrimination/Harassment states, in relevant part:
15

16

17 No employee of the Washington State Patrol shall engage in conduct defined as
18 discriminatory, harassing, or hazing in nature. . . .

19 It is the policy of this department to prohibit all types of harassment and
20 discrimination of any person. . . . For purposes of clarification, harassment shall be
21 generally defined as derogatory epithets; display of derogatory visual or written
22 material; repeated requests for sexual contacts; or other visual, verbal, or physical
23 conduct inappropriate for a work environment. . . .

24 All employees are expected to adhere to a standard of conduct that is respectful,
25 courteous, nonoffensive, and nondiscriminatory.
26

. . . .

2.9 WSP Regulation 8.00.490 Off-Duty Employment Regulations states, in relevant part:

1 An employee's primary employment is with the department. Secondary employment
(including self-employment) . . . shall not interfere with performance of
2 department duties.

3

4 Secondary employment may be prohibited when it

- 5 • Impedes the ability of the department to fulfill responsibilities.
- 6 • Creates adverse effect on discipline or efficiency.
- 7 • Creates a conflict of interest with law or department regulation.
- 8 • Discredits the department.

8 2.10 WSP Regulation 18.00.010 Care and Use of Equipment or Property states, in relevant part:

9 All employees having or using any equipment or property belonging to the
10 department shall be charged with its proper care and handling. Department
11 equipment shall not be used for other than assigned purposes without prior
permission of the appropriate commander concerned.

12
13 *Allegations of interfering in employees' personal lives, excessive generosity, and creating a hostile*
14 *work environment.*

15 2.11 In 1983, Appellant's wife and Rosemary Brehm developed a personal friendship. Mrs.
16 Nishimura was Ms. Brehm's daughter's first grade teacher. Appellant became acquainted with Ms.
17 Brehm through his wife. The families developed a friendship that included vacationing together,
18 exchanging presents, helping each other with maintenance projects on their respective homes,
19 dining together, and exchanging other generosityes.

20
21 2.12 On February 12, 1990, Ms. Brehm went to work in the Seattle Crime Laboratory as a
22 forensic document examiner. Appellant was her trainer and supervisor.

23
24 2.13 While in the Seattle Crime Laboratory, Appellant would occasionally take Ms. Brehm and
25 others to lunch. Sometimes the lunches were for special occasions such as birthdays or employment
26 anniversaries. In most cases, Appellant paid for the lunches even though his lunch companions

1 offered to pay. Ms. Brehm and others felt uncomfortable when Appellant paid for their lunches,
2 however, they did not tell Appellant about their discomfort. On occasion, they would turn down his
3 invitations to lunch. Appellant never retaliated against them for turning down an invitation.

4
5 2.14 Kim Duddy worked in the Seattle Crime Laboratory as a forensic scientist and car-pooled to
6 work with Appellant. Appellant did not supervise Ms. Duddy. In 1993 or 1994, Appellant detailed
7 and washed Ms. Duddy's car. In addition, to cleaning Ms. Duddy's car, Appellant filled the car with
8 gas and purchased new floor mats for it. Ms. Duddy attempted to reimburse Appellant for the gas
9 and floor mats; however, Appellant refused to accept her offers of repayment.

10
11 2.15 In 1994, Ms. Brehm's car needed repairs. Ms. Brehm had purchased the car from Appellant
12 and his wife in 1992. Without telling Ms. Brehm, Appellant paid \$200 toward the repair bill.
13 When Ms. Brehm learned that Appellant had given her mechanic \$200 toward the bill, she
14 attempted to reimburse Appellant. Appellant refused to accept Ms. Brehm's check and told her that
15 the \$200 was a birthday gift to Ms. Brehm from him and his wife.

16
17 2.16 In 1994, Ms. Brehm was planning to paint her house. Appellant offered to help her but Ms.
18 Brehm refused his help. Ms. Brehm was concerned that Appellant would insist on helping so she
19 did not tell him when she started the project. When Appellant learned that the project was in
20 progress, he did not help. However, he and his wife purchased new house numbers for Ms. Brehm's
21 house. Ms. Brehm accepted the house numbers as a gift.

22
23 2.17 In 1995, Ms. Brehm and Janis Parker, another of Appellant's subordinates in the Seattle
24 Crime Laboratory, attended the first day of a two-day training session. Respondent had approved
25 payment for the first day of the training. Appellant felt that they should be able to attend both days
26 of the training. He placed \$75 in two separate envelopes with notes and placed them on each of

1 their respective desks. Appellant indicated that the \$75 was to pay for their attendance at the
2 second day of training. Neither Ms. Brehm nor Ms. Parker wished to attend the second day of
3 training and they both returned the money to Appellant.

4
5 2.18 In 1999, Ms. Brehm accepted a custom-made cut-glass window for her home as a Christmas
6 present from Appellant and his wife. The window was paid for, constructed, and installed by
7 members of Appellant's family. Ms. Brehm did not feel that this gift from the family was
8 inappropriate.

9
10 2.19 Ms. Brehm, Ms. Duddy and Ms. Parker were uncomfortable accepting Appellant's excessive
11 generosity. However, they feared that if they argued with him, their working relationship would be
12 damaged and Appellant would retaliate against them.

13
14 2.20 There is no evidence that Appellant retaliated against staff for refusing his generosity or
15 that he expected anything in return from the recipients of his generosity.

16
17 *Allegations of improper conduct with sexual overtones and creating a hostile work environment.*

18 2.21 In 1990, while Ms. Brehm was still a probationary employee, Appellant placed a condom on
19 her desk on three separate occasions. Ms. Brehm was embarrassed by Appellant's inappropriate
20 actions, but she was hesitant to say anything because she was a probationary employee.

21
22 2.22 In 1995 or 1996, Appellant placed a toy "crime scene kit" on Ms. Duddy's desk. Appellant
23 included a condom and a toothbrush in the kit. Ms. Duddy felt that Appellant's action was
24 prompted by the personal interest a fellow crime scene investigator had shown in her. She was
25 shocked and felt embarrassed by Appellant's action, but she did not confront him.

1 2.23 In approximately 1997, Ms. Brehm was on leave visiting a male friend. Appellant joked
2 with Janice Parker that he should put a home pregnancy kit on Ms. Brehm's desk for her return.
3 Ms. Parker informed Appellant that she did not think it was funny and that the joke was in poor
4 taste. Appellant did not follow through on the intended joke. Appellant discussed with his co-
5 workers Ms. Brehm's relationship with her male friend.

6
7 2.24 Also in 1997, Appellant asked Ms. Brehm and Ms. Parker to go to lunch with him at
8 Hooters restaurant. On another occasion, Appellant asked Lynn McIntyre, supervisor of the Seattle
9 Crime Laboratory Biochemical Analysis Unit, to go to lunch with him at Hooters restaurant.
10 Hooters is a chain of restaurants that is known to feature waitresses in tight-fitting, skimpy outfits.
11 Ms. Brehm, Ms. Parker and Ms. McIntyre felt that going to Hooters was inappropriate and they
12 declined Appellant's invitations. Appellant did not ask them again. There is no evidence that
13 Appellant retaliated against them for refusing his invitation.

14
15 *Allegation of using state-owned equipment and time for personal gain and creating a hostile work*
16 *environment.*

17 2.25 Respondent did not object to Appellant performing forensic document examination work for
18 civil cases during his off-duty time. Appellant had a home laboratory containing the equipment he
19 needed to perform work on civil cases. While he was working in the Seattle Crime Laboratory,
20 Appellant took home filters from WSP video spectral comparator equipment for comparison with
21 the equipment he used at home. There is no evidence that Appellant used the filters to examine
22 documents for his off-duty cases.

23
24 2.26 During his work hours, Appellant occasionally received telephone calls related to his off-
25 duty casework. Appellant received these calls on his personal cell phone. A preponderance of the
26 credible evidence establishes that Appellant did not engage in conversations with his off duty

1 clients during work hours. Rather, he would return the calls during his breaks, lunch periods or
2 after work hours. There is no evidence that these calls interfered with Appellant's duties with the
3 WSP or that he performed personal business during work hours.

4
5 2.27 As an experienced examiner, Appellant was responsible for training new employees.
6 Appellant would sometimes share examples of his civil cases with the forensic document examiners
7 he was training. The trainees did not perform any work on Appellant's civil cases.

8
9 *Inappropriate training tools.*

10 2.28 While training Heather Carlson, a forensic document examiner in training, Appellant used
11 examples of Ms. Brehm's work to demonstrate a "conservative" report. He then had Ms. Carlson
12 rewrite Ms. Brehm's reports. Ms. Carlson perceived Appellant's comments about Ms. Brehm's work
13 to mean that Ms. Brehm did not perform her job well. Appellant used the reports to demonstrate the
14 difference in content of a report written by an examiner working alone as opposed to an examiner
15 working and sharing ideas with a colleague.

16
17 2.29 Although they worked in different locations, Ms. Brehm and Ms. Carlson had contact with
18 each other on occasion. Ms. Brehm believed that Ms. Carlson was under a great deal of stress and
19 was concerned that Ms. Carlson was being subjected to Appellant's inappropriate behavior. Ms.
20 Brehm planned to resign from her employment with WSP and decided that she had nothing to lose
21 by coming forward with her concerns about Appellant. On March 27, 2000, Ms. Brehm reported
22 her concerns to Larry Hebert, Manager of the Crime Laboratory Division. Ms. Brehm alleged that
23 Appellant created a hostile and sexually harassing work environment and that he caused her to feel
24 threatened and fear retaliation.

1 2.30 On March 27, 2000, Mr. Hebert initiated an Internal Incident Report. The WSP Office of
2 Professional Standards (OPS) conducted an investigation and provided the results to Mr. Hebert.
3 Mr. Hebert issued a July 10, 2000 memorandum entitled Administrative Insight - Mr. Timothy
4 Nishimura. The memorandum specified the allegations against Appellant. Appellant responded to
5 the allegations by letter dated August 3, 2000, and orally during a pre-termination hearing held on
6 August 3, 2000.

7
8 2.31 Mr. Hebert concluded that Appellant neglected his duty as a supervisor and manager to
9 ensure that the workplace was free of harassment and that all employees were treated with respect
10 and dignity. Mr. Hebert also determined that Appellant interfered with female subordinates' and co-
11 workers' personal lives, which created an uncomfortable working environment for them. Mr.
12 Hebert felt that Appellant used his position to exercise power and control over his subordinates and
13 caused them to fear retaliation. Mr. Hebert also felt that Appellant made negative comments about
14 Ms. Brehm's work product and attempted to ruin her reputation as a trusted and valued employee.
15 Mr. Hebert determined that Appellant violated agency regulations when he used state-owned
16 equipment for his off-duty work and that he exercised poor judgment when he brought private
17 casework into the workplace. Mr. Hebert found that Appellant had been counseled regarding his
18 problems with human relations but that he failed to take advantage of the opportunities given to him
19 to improve his skills and effectively manage the lab. Mr. Hebert concluded that Appellant
20 demonstrated a need for control and power, a general lack of skills necessary to be an effective
21 manager or supervisor, a willful disregard of agency regulations, and created a hostile work
22 environment for employees.

23
24 2.32 After reviewing all of the information provided during the investigation, including
25 Appellant's responses and his employment history, Mr. Hebert determined that termination was
26

1 appropriate. By letter dated September 6, 2000, Mr. Hebert notified Appellant of his termination,
2 effective September 20, 2000.

3 4 **III. ARGUMENTS OF THE PARTIES**

5 3.1 Respondent acknowledges that Appellant was an excellent document examiner, but asserts
6 that he acted totally inappropriate with subordinates. Respondent asserts that Appellant admitted
7 his actions and provided nothing to mitigate his behavior. Respondent contends that Appellant
8 failed to maintain a high standard of professional and ethical conduct, lacked the skills to supervise
9 staff, and failed to maintain a work environment that was free of harassment, bias and unfair
10 treatment. Respondent contends that Appellant was in a position to take adverse action against his
11 subordinates, that his behavior created an environment of fear and intimidation that left his
12 subordinates feeling that they owed him something, and that his behavior had a severe negative
13 impact on the emotional well being of his subordinates and their desire to be at work. Respondent
14 asserts that Appellant had an obligation to treat fellow employees with dignity and respect and that
15 even if he was a friend to his coworkers, Appellant's behavior in the workplace was not appropriate.
16 Respondent contends that Appellant actions were neglectful of his responsibilities as a manager and
17 supervisor and violated published agency policies and regulations. Respondent further contends
18 that efforts through informal counseling to assist Appellant to improve his management style were
19 unsuccessful. Respondent contends that Appellant engaged in each act of alleged misconduct and
20 that dismissal is warranted.

21
22 3.2 Appellant acknowledges that he engaged in the activities for which he was disciplined but
23 contends that Respondent took the incidents out of context and failed to consider extenuating
24 circumstances that mitigate the severity of his actions. Appellant states that he feels badly about the
25 way his subordinates and coworkers perceived his actions but asserts that he was not aware of the
26 impact of his actions because no one told him that his generosity was not welcomed. Appellant

1 argues that some of the allegations against him were not work related and that there is an
2 insufficient nexus between those events and his position with WSP. Appellant admits that he
3 should not be in a supervisory position but argues that he is a long-term employee, that he is close
4 to retirement and that he should have been given an opportunity to correct his behavior before he
5 was dismissed. Appellant asserts that this is a case of erroneous perceptions and that dismissal is
6 not appropriate. Appellant contends that he did not misuse state equipment, engage in inappropriate
7 conduct, engage in retaliation, or violate WSP regulations.

8 9 IV. CONCLUSIONS OF LAW

10 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
11 herein.

12
13 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
14 the charges upon which the action was initiated by proving by a preponderance of the credible
15 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
16 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
17 Corrections, PAB No. D82-084 (1983).

18
19 4.3 Respondent has met its burden of proof that Appellant engaged in unbecoming conduct and
20 neglected his duty to treat others with respect and dignity. Appellant's misconduct was directed, for
21 the most part, at his subordinates, was egregious in nature, and demonstrated his inability to
22 function in a supervisory or managerial role. Appellant's actions constituted a violation of WSP
23 regulations 8.00.030, 8.00.180, and 8.00.385.

24
25 4.4 Under the unique circumstances presented here, including the off-duty relationship between
26 Appellant and Ms. Brehm, Ms. Brehm's selective assertions of which generosities were

1 inappropriate, and the lengthy span of time from when the actions occurred and when they were
2 reported, Respondent did not meet its burden of proof that Appellant's actions created a hostile
3 work environment. While the allegation of creating a hostile work environment has not been
4 proved, Appellant left himself open to such charges by intertwining his personal friendships and
5 professional life. The lack of appropriate boundaries between his personal and professional life
6 further demonstrates that Appellant should not be in a supervisory role.

7
8 4.5 Respondent has met its burden of proof that Appellant violated WSP Regulation 18.00.010
9 when he removed WSP equipment from the workplace without prior permission from the
10 appropriate commander. However, Respondent did not meet its burden of proving that Appellant
11 used WSP equipment or time for private gain, that he conducted private business while on duty, or
12 that his secondary employment interfered with his performance of department duties.

13
14 4.6 Respondent failed to prove that Appellant's use of private casework materials or Ms.
15 Brehm's reports for training purposes was inappropriate.

16
17 4.7 In determining whether a sanction imposed is appropriate, consideration must be given to
18 the facts and circumstances including the seriousness and circumstances of the offense. The penalty
19 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
20 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
21 An action does not necessarily fail if one charge is not sustained unless the entire action depends on
22 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

23
24 4.8 Under the totality of the proven facts and circumstances, dismissal is too severe. A
25 demotion to a non-supervisory position would be sufficient to prevent recurrence, to deter others

1 from similar misconduct, and to maintain the integrity of the program. Therefore, the appeal should
2 be granted in part, and Appellant should be demoted to a Forensic Document Examiner 3 position.

3
4 **V. ORDER**

5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Timothy Nishimura is granted
6 in part, the disciplinary sanction is modified, and he is demoted to a position as a Forensic
7 Document Examiner 3.

8 DATED this _____ day of _____, 2002.

9
10 WASHINGTON STATE PERSONNEL APPEALS BOARD

11
12 _____
Walter T. Hubbard, Chair

13
14 _____
Gerald L. Morgen, Vice Chair